

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRENT LANG,

Defendant-Appellant.

UNPUBLISHED

January 23, 2014

No. 312543

Wayne Circuit Court

LC No. 11-011901-FC

Before: STEPHENS, P.J., and M. J. KELLY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, possession of a firearm by a felon (felon in possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), second-offense, MCL 750.227b. Defendant was sentenced to 30 years and 5 months to 60 years for second-degree murder, 22 years and 6 months to 35 years for assault with intent to murder, 1 to 5 years for felon in possession, and 5 years for felony-firearm. We affirm.

I. FACTUAL BACKGROUND

Angelo James (James) was with the decedent, James Watson (Watson), and another man, Courtney Putman, on the porch of an abandoned home in Detroit, Michigan. James was drinking on the nearby sidewalk when he saw defendant riding down the street on a mountain bicycle, dressed in all black and a hood. James recognized defendant from seeing him over the course of six years within the neighborhood. James later saw a different man riding the same bike.

At some point later James went to the store to buy more alcohol, and returned to the porch with Watson. Putnam went to his house across the street. While Watson was rolling marijuana, James did not smoke any. Watson told James that he had a .357 handgun nearby, and James knew that Watson sold marijuana. James then heard a noise from the side of the house and stood up to investigate. There were streetlights that illuminated the area. James saw defendant and another man come from the side of the house, and both men were pointing guns at James and Watson. Defendant ordered them not to move.

James initially froze. But as he turned to run into the house, the shooting began, and he was hit in the arm and leg. He heard more shots ring out, and saw Watson come into the house.

James stood up, but when he reached Watson, both men collapsed. Watson was gasping, and eventually became still. James heard Putnam calling his name, and with help he was able to get to a car. On the way to the hospital they saw an ambulance, which transported James to the hospital. James testified that he did not tell the police who shot him until after surgery because he was in pain at first. He testified that he was sure defendant was one of the men with a gun.

The police arrived at the house and recovered a .357 Taurus revolver from the porch. They also found James's Michigan identification in the vicinity of the gun, and in the walls of the house they found what appeared to be bags of marijuana. They also collected three 45 automatic caliber fired cartridge cases, one nine millimeter Luger caliber fired cartridge case, and a .357 magnum caliber fired cartridge case. The five shot Taurus revolver that was found contained four .357 magnum caliber cartridges.

The police also discovered Watson, who had been shot in the chest and leg. From Watson's leg wound, they extracted a fired bullet jacket and one core portion of the jacketed bullet. The bullet to his chest perforated his aorta, which was enough to kill him.

Defendant was convicted of second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, felon in possession, MCL 750.224f, and felony-firearm, second-offense, MCL 750.227b. Defendant now appeals on several grounds.

II. GREAT WEIGHT OF THE EVIDENCE

A. STANDARD OF REVIEW

Defendant first argues that his convictions were against the great weight of the evidence. "We review unpreserved claims that the verdict was against the great weight of the evidence for plain error affecting the defendant's substantial rights." *People v Brantley*, 296 Mich App 546, 553; 823 NW2d 290 (2012).

B. ANALYSIS

A verdict is against the great weight of the evidence when "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). "Generally, a verdict may be vacated only when the evidence does not reasonably support it and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence." *Id.* Moreover, conflicting testimony or questions concerning the credibility of the witnesses generally are not sufficient grounds for granting a new trial. *Brantley*, 296 Mich App at 553.

Defendant argues that James's identification testimony was unreliable because he only glimpsed two people in an unlit area, his attention was on the guns, and he did not immediately tell the police who shot him. Yet, this is a challenge to the credibility of James's testimony, which is within the jury's purview and will not be second-guessed on appeal. *Lacalamita*, 286 Mich App at 469. Furthermore, James testified that although it was dark outside, streetlights illuminated the area, allowing him to see defendant clearly. He also testified that he was sure defendant was one of the two men who accosted them, as he was familiar with defendant from

seeing him in the neighborhood for the past six years. A reasonable trier of fact could have found James's testimony believable and credible.

Defendant also argues that his convictions were against the great weight of the evidence because Watson was somehow shot by his own weapon, the .357 magnum Taurus revolver, which conflicted with James's version of events. The firearm and tool mark expert testified that they recovered a fired bullet jacket, item 10-A, and a core portion of the jacketed bullet, item 10-B, from Watson's leg. While the expert could not identify from which weapon the core portion of the jacketed bullet came, he testified that the fired bullet jacket came from the Taurus revolver recovered at the scene. Thus, defendant contends that the verdict was against the great weight of the evidence because the victim was shot with his own gun, the Taurus revolver.

However, no testimony was offered regarding the origin of the bullet that hit Watson in the chest. The medical examiner testified that the gunshot to Watson's chest would have been enough to kill him. Moreover, as the prosecutor argued in closing, because the Taurus revolver had five shots and one was missing, it was not unreasonable for the jury to conclude that the victim did not shoot himself in the chest with the Taurus revolver. While defendant also argues that James's explanation of the events does not explain how the victim was shot in the leg, James testified that he turned to run into the house right before the shooting began. Thus, James's testimony did not conflict with the physical evidence, as he simply did not know who was shooting or which guns were used.¹

Thus, defendant has failed to establish that "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Lacalamita*, 286 Mich App at 469.

III. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Defendant next argues that there was insufficient evidence to support his conviction for second-degree murder. We review "de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010).

B. ANALYSIS

"In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor" to ascertain "whether a rational trier of fact could find the defendant guilty beyond a

¹ While defendant conclusively states that the two perpetrators used the 45 automatic weapon and the nine millimeter Luger, that is merely an inference based on James's testimony that the victim owned a .357 handgun and that the Taurus was found at the scene. No direct evidence was submitted regarding which of the weapons the two perpetrators were holding or used during the shooting.

reasonable doubt.” *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (internal quotations and citations omitted). “All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury’s determinations regarding the weight of the evidence and the credibility of the witnesses.” *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008). However, “[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

In the instant case, defendant challenges the identity element supporting his conviction. “[I]t is well settled that identity is an element of every offense.” *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). While defendant argues that his identity was not proven beyond a reasonable doubt, we have recognized “that positive identification by witnesses may be sufficient to support a conviction of a crime.” *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Further, “credibility of identification testimony is a question for the trier of fact that we do not resolve anew.” *Id.*

From the evidence presented at trial, a rational trier of fact could have reasonably determined that defendant was one of the two men that James identified. The firearm and tool mark expert testified that the casings he examined came from at least three different weapons. James testified that he saw defendant just before the shooting. James identified defendant soon after the shooting as one of the two men who pointed a gun at him and Watson. Based on this unequivocal identification of defendant, a rational trier of fact could have concluded that defendant’s identity as a shooter was proven beyond a reasonable doubt. While defendant again argues that the prosecution could not prove his identity as a shooter because Watson was shot with his own weapon, as discussed *supra*, that argument is without merit.

IV. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW

Defendant next asserts that the prosecution improperly vouched for James’s credibility during closing argument. “Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error.” *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). “Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Unger*, 278 Mich App at 235 (quotation marks and citation omitted).

B. ANALYSIS

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). “Generally, prosecutors are accorded great latitude regarding their arguments and conduct.” *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (quotation marks, citation, and brackets omitted). “Prosecutors have discretion on how to argue the facts and reasonable inferences arising therefrom, and are not limited to presenting their arguments in the blandest terms possible.” *People v Meissner*, 294 Mich App 438, 456; 812 NW2d 37 (2011). Although the prosecution may not vouch for the credibility of a witness, it may comment on whether a witness

is worthy of belief. *People v Schultz*, 246 Mich App 695, 712; 635 NW2d 491 (2001); *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

In the instant case, defendant argues that the prosecution improperly vouched for James's credibility when stating that because James disclosed that he and Watson were drinking alcohol, had marijuana, and had a gun, he had character for truthfulness. This was not improper vouching. The prosecution did not indicate that he had some type of special knowledge of the witness's truthfulness. *Meissner*, 294 Mich App at 456. While it is unfortunate that the prosecutor used the word "character" in his argument it is clear from the record that he was arguing not the witnesses character but his credibility. The prosecution merely argued that based on the disclosures the witness made, he was worthy of belief because he was giving truthful testimony. *Dobek*, 274 Mich App at 66 (a prosecutor is allowed to present "arguments from the facts and testimony that the witnesses at issue were credible or worthy of belief.")²

Moreover, the trial court in the instant case instructed the jury that the lawyer's statements and arguments were not evidence, and "[j]urors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Thus, defendant has failed to demonstrate prosecutorial misconduct.

V. EFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Lastly, defendant argues that he was denied the effective assistance of counsel when his counsel failed to object to the prosecutor's improper statements during closing argument. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). When reviewing a claim of ineffective assistance of counsel that has not been preserved for appellate review, a reviewing court is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

B. ANALYSIS

In order to establish a claim for ineffective assistance of counsel, a defendant must first demonstrate that "counsel's representation fell below an objective standard of reasonableness," which requires a showing "that counsel's performance was deficient." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). In making this showing, a defendant must overcome the strong presumption that trial counsel's behavior was sound trial strategy. *Grant*, 470 Mich at 485. The

² Because there were no errors, there was no cumulative effect necessitating reversal. *People v Brown*, 279 Mich App 116, 146; 755 NW2d 664 (2008) (quotation marks and citation omitted) ("Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal.").

second prong a defendant must demonstrate is that “the deficient performance prejudiced the defense,” which “requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial” *Strickland*, 466 US at 687. In other words, a defendant must demonstrate that “there was a reasonable probability that the outcome of the trial would have been different had defense counsel” adequately performed. *Grant*, 470 Mich at 496.

As discussed above, the prosecution’s statements were proper. “Because the comments were proper, any objection to the prosecutor’s arguments would have been futile. Counsel is not ineffective for failing to make a futile objection.” *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Moreover, any minimal prejudice was alleviated with the trial court’s instruction, and it did not result in a reasonable probability that the outcome of the trial would have been different. *Grant*, 470 Mich at 496.

VI. CONCLUSION

The verdicts were not against the great weight of the evidence nor was there insufficient evidence to support defendant’s convictions. Moreover, there were no instances of prosecutorial misconduct nor was defendant denied the effective assistance of counsel. We affirm.

/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly
/s/ Michael J. Riordan